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IN THE

Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS, *et al.*
Petitioners,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONERS

THOMAS F. REILLY
Attorney General
of Massachusetts

RICHARD J. LAZARUS
LISA HEINZERLING
Georgetown Univ. Law Center
600 New Jersey Ave., N.W.
Washington, DC 20001

JAMES R. MILKEY*
WILLIAM L. PARDEE
CAROL IANCU
Assistant Attorneys General
1 Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200
**Counsel of Record*

Attorneys for Petitioners
(Additional Counsel Listed on Signature Pages)

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EPA's brief in opposition underscores rather than diminishes the urgency of this Court's review. First, the Solicitor General, on behalf of EPA, embraces the radical administrative law implications of the lead opinion below. It is black letter law that an agency must confine its decision-making to the factors that Congress mandated the agency to consider. Yet, because the Clean Air Act authorizes the Administrator to use his "judgment" in exercising his regulatory authority, EPA argues that the Administrator possesses unbridled discretion to act in any way he sees fit and is free to rely on broad policy considerations untethered to the substantive standards set forth in the statute. EPA Br. in Opp. 20. EPA asserts nothing short of the power to override the express limitations on agency discretion that Congress has enacted. Because literally hundreds of federal statutes authorize agency officials to use their "judgment" in exercising their discretion, the lead opinion below – now emphatically embraced by the Solicitor General – has sweeping ramifications for executive branch authority. These ramifications, standing alone, supply the "compelling reasons" necessary to warrant this Court's review. S. Ct. R. 10.

Second, EPA's opposition claims that the result below can be defended as an expert agency evaluation of scientific uncertainty. EPA Br. in Opp. 4-5, 19-21. But the brief cannot obscure the fact that the agency below never applied the governing statutory standard and relied on *ultra vires* policy considerations. This Court's supervisory review is necessary to assure that lower courts prevent, rather than encourage, such reckless agency departures from their statutory mandates.

Third, as described in the petition, the Court should extend its grant of certiorari to the legal question whether EPA has authority to regulate carbon dioxide and other "greenhouse gases" as "air pollutants," within the meaning of the Clean Air Act, even though the court below did not reach the issue. That legal issue was fully briefed below, exhaustively analyzed in Judge Tatel's separate opinion, and would not appreciably benefit from further "percolation" in the lower courts, especially in light of the D.C.

Circuit's exclusive jurisdiction over EPA actions that have national applicability. And, once the Court reaches the question of whether EPA can rely on policy considerations not enumerated in the statute, judicial efficiency strongly supports review of whether the agency has authority to regulate greenhouse gases.

Fourth, EPA's claim that petitioners lack Article III standing (EPA Br. in Opp. 10-15) does not support the petition's denial. The lower court's conclusion on standing does not conflict with decisions of any other court of appeals, and it presents a fact-bound ruling that does not rise to the level of importance necessary for this Court's plenary consideration. Because, moreover, petitioners clearly meet Article III standing requirements, there is nothing preventing this Court from reaching the important question of federal law presented by the petition.

Finally, the Court should decline the brief in opposition's invitation to delay indefinitely any consideration of the critical legal issues raised by the petition. There are compelling reasons for the Court to join the issue now. The question whether and to what extent this nation should be addressing global climate change is one of the most important public health and welfare issues of the twenty-first century, with extraordinary implications for present and future generations of Americans.

We believe that the science is clear that EPA should act. But whatever one believes on this point, the executive branch cannot ignore the clear instructions of the legislative branch in determining how best to address such an important issue. Congress has not ordained the EPA or any other part of the executive branch a "super legislature" to decide how climate change should be addressed. Congress instead enacted a law, the Clean Air Act, that established a framework for addressing new air pollution problems, as they appeared, including through regulating emissions from motor vehicles. It is incumbent upon the executive branch to adhere strictly to the law's terms. If the

executive branch believes there is a reason to depart from that existing statutory framework, its sole recourse is to persuade Congress to amend the law. For that reason, the lower court fundamentally erred in sanctioning the executive branch's bald attempt to refashion the law by administrative fiat. The petition should, accordingly, be granted.

I. The Solicitor General's Assertion That EPA Has Virtually Unbridled Discretion Underscores the Need for this Court's Review.

On behalf of EPA, the Solicitor General invokes a radical vision of administrative law under which agencies can exercise unlimited legislative judgment immune from judicial review. This extraordinary assertion of executive authority underscores the need for this Court's review.

Section 202(a)(1) of the Clean Air Act dictates that the Administrator's decision whether to regulate motor vehicle emissions must turn on his "judgment" whether these emissions "may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). The lower court decision, however, allows EPA to base its decision on "'policy' considerations" that are not legally relevant under the statutory endangerment standard. (App. 13-14.) As Judge Tatel observed in dissent, the statute provides the Administrator "no discretion either to base that judgment on reasons unrelated to this standard or to withhold judgment for such reasons." (App. 46.) EPA cannot ignore a congressional mandate that it "shall" regulate dangerous substances simply because it disagrees that such regulation would be a good idea.

In its opposition, EPA responds with extravagant claims of virtually unlimited discretion. EPA contends that because Section 202(a)(1) authorizes the agency to use "judgment" in deciding whether the endangerment standard has been met, the Administrator has authority to consider any other policy

consideration he chooses. EPA Br. in Opp. 20. According to the agency: "Section 202(a)(1) simply states that any regulation in this area is conditioned on an exercise of EPA's 'judgment,' and it does not in any way cabin the Agency's discretion -- procedural or substantive -- to decide how to make that judgment most effectively." *Id. See, also, id.* at 19 & n.7 (defending the agency's decision not to regulate based on its assessment of the "policy implications" of regulating).

The word "judgment" cannot support the Solicitor General's sweeping claim of unbridled executive branch lawmaking authority. Simply put, authorizing an agency official to use "judgment" in applying the surrounding statutory criteria does not evince congressional intent to override the plain meaning of those criteria. In choosing language of governing statutes, Congress carefully imposes important substantive and procedural restraints on agency officials' exercise of their lawmaking authority. These restraints supply the "intelligible principle" necessary to avoid nondelegation doctrine concerns, as well as the "law to apply" necessary for judicial review. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971) (citation omitted).

EPA's provocative contentions are squarely opposed to this Court's administrative law precedents. It is axiomatic that an agency must stick to the criteria that its statute makes relevant. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins.Co.*, 463 U.S. 29, 43 (1983). This Court has emphatically applied this principle in interpreting the Clean Air Act. In *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 467-71 (2001), the Court unanimously rejected the notion that EPA could apply economic factors to a decision that Congress directed be made based on health-based criteria. Notably, the Court rejected the argument that the Administrator could apply substantive policy factors other than those set forth in the statute even though the statute directed him to apply his "judgment" in

coming to a decision. *Id.* at 469.

The one opinion of this Court that EPA cites in support of its claim to unbridled discretion does not help the agency. That case, *Vermont Yankee Nuclear Power Corp v. NRDC,* 435 U.S. 519 (1978), rejected the D.C. Circuit's imposition of extra procedures on agency rulemakings beyond the Administrative Procedure Act minimum. Far from advocating imposition of optional procedures, petitioners here simply seek ordinary judicial review of a final agency decision, as expressly provided for in the Clean Air Act. In *Motor Vehicle Mfrs. Ass'n,* this Court recognized that *Vermont Yankee* poses no obstacle to such review, and indeed cautioned against reading that decision as "a talisman under which any agency decision is by definition unimpeachable." 463 U.S. at 50.[1]

The Solicitor General's contention that the statutory phrase "in his judgment" confers unfettered discretion would have a huge impact on executive branch authority far beyond this case. The directive to use "judgment" in applying statutory criteria is repeated not only throughout federal environmental laws, but in a host of other federal laws covering a wide range of subjects. In each such statute, Congress has conferred lawmaking authority on federal executive branch agencies. As this Court described in *Whitman v. American Trucking*:

> the degree of agency discretion that is acceptable varies according to the scope of the power congressionally

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[1] EPA also claims that its decision below may be unreviewable because it involves the denial of a rulemaking petition, despite the fact that the agency issued a detailed decision on the merits after soliciting and considering almost 50,000 public comments. *See* EPA Br. in Opp. 17, n. 6 (suggesting that an agency's discretion to reject regulatory action is "'so broad as to make the process akin to nonreviewability,'" *quoting Nat'l Mining Ass'n v. DOI,* 70 F.3d 1345, 1352 (D.C. Cir. 1995)). This extraordinary position is refuted by the Clean Air Act's judicial review provisions and the Administrative Procedure Act, neither of which distinguishes between such denials and other kinds of agency decisions.

> conferred. While Congress need not provide any direction to EPA regarding the manner in which it is to define "country elevators," * * * it must provide substantial guidance on setting standards * * * that affect the entire national economy.

531 U.S. at 475 (citation omitted).

Yet, according to the Solicitor General and EPA, by including the statutory phrase "in his judgment," Congress has dictated that there be no limits at all – either "procedural or substantive" (EPA Br. in Opp. 20) – on agency discretion in administering hundreds of federal statutory programs throughout the United States Code. The separation of powers implications of such a pernicious proposition clearly supply the "compelling reasons" necessary to warrant this Court's review. S. Ct. R. 10.

II. EPA Mischaracterizes This Case As Turning On Its Evaluation of Scientific Uncertainty

The Solicitor General alternatively suggests that EPA's decision turned exclusively on the agency's evaluation of uncertainty in the science of climate change. *See, e.g.*, EPA Br. in Opp. 4-5. But EPA has never claimed that additional information is needed to form a "judgment" on whether the endangerment standard had been met. *See* App. 50 (Tatel, J.) Moreover, scientific uncertainty was only one of several factors that EPA cited as a reason for not setting emission standards for greenhouse gases. *See* App. 13-15. Judge Randolph's lead opinion expressly noted (and endorsed) the Administrator's reliance on wide ranging "'policy' considerations" akin to those that might be considered by a legislature in deciding whether to pass a law. *Id.* Reliance on these *ultra vires* factors inherently taints EPA's decision, and, at the very least, a remand is required to compel the lower court to apply the statutory standard actually supplied by Congress – whether greenhouse gas emissions from motor vehicles "cause or contribute to, air

pollution which may reasonably be anticipated to endanger public health or welfare." *See* 42 U.S.C. § 7521 (a)(1).

Further, the brief in opposition mischaracterizes the science in the administrative record, in particular the 2001 National Research Council Report on which it claims to rely. *See* Br. in Opp. 4. What the 2001 report actually expressed was the consensus conclusion of scientific experts throughout the world that, "[d]espite the uncertainties," global warming is real and is occurring as a result of greenhouse gas emissions. *See, e.g.*, NRC Report at 1, 3 [JA 681, 683].

The amicus brief filed by leading climate scientists, including several authors of the NRC Report, explains how EPA and the lead opinion below misrepresent what the 2001 report actually says by using selective citations "that emphasize uncertainties in the details while neglecting fundamental areas of certainty or consensus, giving the impression that climate science is more uncertain than it actually is." *See,* Br. of *Amici Curiae* Climate Scientists David Battisti, *et al.*, 16. While the scientists obviously believe that further study as to the exact timing and magnitude of the anticipated impacts has important value, they emphasize that such study need not, and should not, delay evaluation of the scope of the threat posed and whether regulation is warranted. *Id.* at 14-16, 19. Their brief underscores EPA's utter failure to explain why remaining uncertainties in the details justify EPA's inaction. *See Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 52 (agency cannot "merely recite the terms 'substantial uncertainty' as a justification for its actions" but must "explain the evidence which is available, and must offer a rational connection between the facts found and the choice made")(internal quotation omitted).

Finally, EPA mischaracterizes petitioners' position on the legal significance of scientific uncertainty. EPA Br. in Opp. 19-20. Petitioners recognize that the EPA Administrator enjoys substantial discretion in evaluating the science so as to form his "judgment" on whether the statutory endangerment standard has

been met. But this is a far cry from the agency's claim – blessed by the lead opinion below – of freedom to cite uncertainty as a basis for refusing regulatory action without in any way measuring the scientific particulars against the statutory endangerment standard. This Court's review is necessary to provide appropriate guidance to the courts of appeal.

III. The Question of EPA's Legal Authority to Regulate Greenhouse Gases Is Fit for Supreme Court Review Now.

EPA argues that this Court should not review whether the Clean Air Act authorizes regulation of greenhouse gas emissions because the question "was not decided by the court of appeals. . . and it has never been addressed by any other court of appeals." EPA Br. in Opp. 22. But that important statutory question was fully argued below, and Judge Tatel's opinion analyzes it in detail, without any contrary views expressed by the other members of the panel. The value of waiting for the D.C. Circuit to address the issue in another case is minimal. This Court should grant review of the question now in the interest of judicial economy. *Bennett v. Spear*, 520 U.S. 154, 166-67 (1997)(reaching issues that were not relied upon by the lower court).

Such review is also supported by the jurisdictional provisions of the Clean Air Act, which favor prompt and definitive review by setting a 60-day statute of limitations and by channeling all nationally applicable EPA decisions to the D.C. Circuit. 42 U.S.C. § 7607(b). *See, also,* H.R. Rep. No. 95-294, at 323-24 (confirming this intent). Indeed, given the D.C. Circuit's exclusive jurisdiction over EPA's nationally applicable decisions, the issue may never come before another circuit.

IV. Petitioners Amply Demonstrated Their Standing.

EPA's claim that petitioners lack Article III standing to challenge EPA's decision (EPA Br. in Opp. 10-15) is neither

worthy of this Court's consideration nor a basis to deny certiorari on the issues petitioners have raised. The lower court's standing determination is correct, does not conflict with any other court of appeals' ruling, and is an entirely fact-bound ruling that falls far short of a legal issue warranting this Court's review. Even if the Court were to conclude that petitioners' standing should be addressed, however, that would at most supply an additional issue for review and not a reason to deny review of petitioners' issues.

The two judges who found jurisdiction each expressly determined that petitioners' declarations supported all three elements of standing: injury-in-fact, causation, and redressability. (App. 8, 27-31.)[2] Their conclusion was unquestionably correct.

Injury in fact: Through voluminous and uncontested declarations, petitioners documented harm they face as a result of EPA's refusal to regulate the emission of greenhouse gases. As just one example, petitioner Massachusetts owns approximately 200 miles of coastline that is being inundated as a result of rising seas caused by greenhouse gas emissions. *See* Hoogeboom Decl. ¶¶ 4-9; Jacqz Decl. ¶¶ 8-11; MacCracken Decl. ¶ 23-25; Kirshen Decl. ¶¶ 7-8, Oppenheimer Decl. ¶ 7. Judge Tatel's opinion includes an extensive discussion of how the injuries that petitioners will suffer are the sorts of specific, concrete injuries necessary to establish injury-in-fact. *See* App. 27-28. EPA does not contest

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[2] While finding jurisdiction, Judge Randolph nevertheless raised some question about petitioners' standing. He concluded that there appeared to be a live factual controversy over standing based on his sense that there must be evidence in the administrative record (which he did not identify) that "contradicts petitioners' claim that greenhouse gas emissions from new motor vehicles have caused or will cause a significant change in the global climate." (App. 9.) But EPA never asserted a factual controversy at any stage of this proceeding and does not do so today. *See* EPA Br. in Opp 15 (disavowing any reliance on a "factual dispute raised by the declarations submitted by petitioners"). Even though Judge Randolph's discussion about what appellate courts should do in the event of a factual dispute over standing was unnecessary, his conclusion that the court had jurisdiction was correct.

this conclusion.[3]

Causation: EPA also does not contest petitioners' demonstration that greenhouse gas emissions are causing their injury. Because greenhouse gases are emitted from many sources, however, EPA argues that petitioners have not sufficiently demonstrated that its failure to set emissions standards for motor vehicles is causing their harm. But it is uncontested that additional greenhouse gas emissions will cause effects (such as increased sea level rise) that will increase petitioners' harm (such as destruction of property that state petitioners own along the coast). This causation depends on the laws of physics, not the independent actions of third parties. Petitioners' uncontested proof of their harm is neither "indirect" nor "speculative."

Redressability: Given this causal relationship, it follows that by limiting emissions from U.S. motor vehicles, EPA would reduce the injury caused to petitioners by these emissions. Hence, reversal of EPA's position would redress harm to the petitioners. Reversal of EPA's legal position would also allow additional redress through regulation of other sources that emit greenhouse gases, such as power plants. Motor vehicles and power plants together represent 60 percent of U.S. carbon dioxide emissions, hardly an inconsiderable share of the problem given that U.S. emissions make up approximately one-fourth of world totals. MacCracken Decl. ¶¶ 30-31. The court of appeals correctly rejected EPA's causation and redressability arguments and properly determined that it had jurisdiction.

Conclusion

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

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[3] The Solicitor General offers no support for Judge Sentelle's conclusion that the generalized grievance doctrine applies (App. 18-19), a conclusion that cannot be squared with either the majority or dissenting opinions in *Federal Election Comm'n v. Akins*, 524 U.S. 11, 23-25, 35 (1998).

Respectfully submitted,

THOMAS F. REILLY
Attorney General
Comm. of Massachusetts

RICHARD J. LAZARUS
LISA HEINZERLING
Georgetown Univ. Law Center
600 New Jersey Ave. N.W.
Washington, DC 20001
(202) 662-9115

JAMES R. MILKEY
Counsel of Record
WILLIAM L. PARDEE
CAROL IANCU
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108
(617) 727-2200

Counsel for Commonwealth of Massachusetts

BILL LOCKYER
Attorney General of California
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612
(510) 622-2133

RICHARD BLUMENTHAL
Attorney General of Connecticut
P.O. Box 120
55 Elm Street
Hartford, CT 06141
(860) 808-5250

LISA MADIGAN,
Attorney General of Illinois
188 West Randolph Street
20th Floor
Chicago, IL 60601
(312) 814-3369

ZULIMA V. FARBER
Attorney General of New Jersey
Richard J. Hughes Justice Complex
25 Market St., P.O. Box 093
Trenton, NJ 08625
(609) 633-8713

G. STEVEN ROWE
Attorney General of Maine
State House Station #6
Augusta, ME 04333
(207) 626-8545

PATRICIA A. MADRID
Attorney General of New Mexico
P.O. Drawer 1508
Sante Fe, NM 87504
(505) 827-6010

ELIOT SPITZER
Attorney General of New York
120 Broadway
New York, NY 10271
(212) 416-8450

HARDY MYERS
Attorney General of Oregon
Oregon Department of Justice
1162 Court Street, Suite 100
Salem, OR 97310
(503) 229-5725

PATRICK C. LYNCH
Attorney General of Rhode Island
150 South Main Street
Providence, RI
(401) 274-4400

WILLIAM H. SORRELL
Attorney General of Vermont
109 State Street
Montpelier, VT 05609
(802) 828-5518

ROB MCKENNA
Attorney General of Washington
P.O. Box 40117
Olympia, WA 98504
(360) 586-4613

ROBERT J. SPAGNOLETTI
Attorney General of the District of Columbia
441 Fourth Street, N.W.
6th Floor South
Washington, DC 20001
(202) 724-5667

MALAETASI M. TOGAFAU
Attorney General of American Samoa
P.O. Box 7
Pago Pago, American Samoa
96799
011 (684) 633-4163

MICHAEL CARDOZO
Corporation Counsel
City of New York
100 Church Street
New York, NY 10007
(212) 676-8517

RALPH S. TYLER III
City Solicitor
City of Baltimore
Baltimore City Dept. of Law
100 Holliday Street
Baltimore, MD 21202
(410) 396-4094

DAVID BOOKBINDER
408 C Street, NE
Washington, DC 20002
(202) 548-4598

Counsel for Center for Biological Diversity, Conservation Law Foundation, Sierra Club, National Environmental Trust, U.S. Public Interest Research Group, Union of Concerned Scientists

HOWARD FOX
1625 Massachusetts Ave.,
NW, Suite 702
Washington, DC 20036
(202) 667-4500

Counsel for Sierra Club

JAY TUTCHTON
Environmental Law Clinic
University of Denver,
College of Law
2255 E. Evans Ave.
Denver, CO 80208
(303) 871-6034

Counsel for Center for Biological Diversity

JOSEPH MENDELSON III
660 Pennsylvania Ave. SE
Washington, DC 20003
(202) 547-9359

Counsel for International Center for Technology Assessment, Center for Food Safety, Environmental Advocates, Greenpeace

DAVID DONIGER
1200 New York Ave.
Washington, DC 20005
(202) 289-2403

Counsel for Natural Resources Defense Council

JAMES B. TRIPP
257 Park Avenue South
17th Floor
New York, NY 10010
(212) 505-2100

Counsel for Environmental Defense

SETH KAPLAN
62 Summer Street
Boston, MA 02110
(617) 350-0990

Counsel for Conservation Law Foundation

JOHN M. STANTON
MARK WENZLER
1200 18th Street, N.W.
Washington, DC 20036
(202) 887-8800

Counsel for National Environmental Trust

BRIAN S. DUNKIEL
Shems Dunkiel Kassel & Saunders PLLC
91 College Street
Burlington, VT 05401
(802) 860-1003

Counsel for Friends of the Earth

JULIE M. ANDERSON
1707 H St., N.W. Suite 600
Washington, DC 20006
(202) 223-6133 Ext. 109

Counsel for Union of Concerned Scientists

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